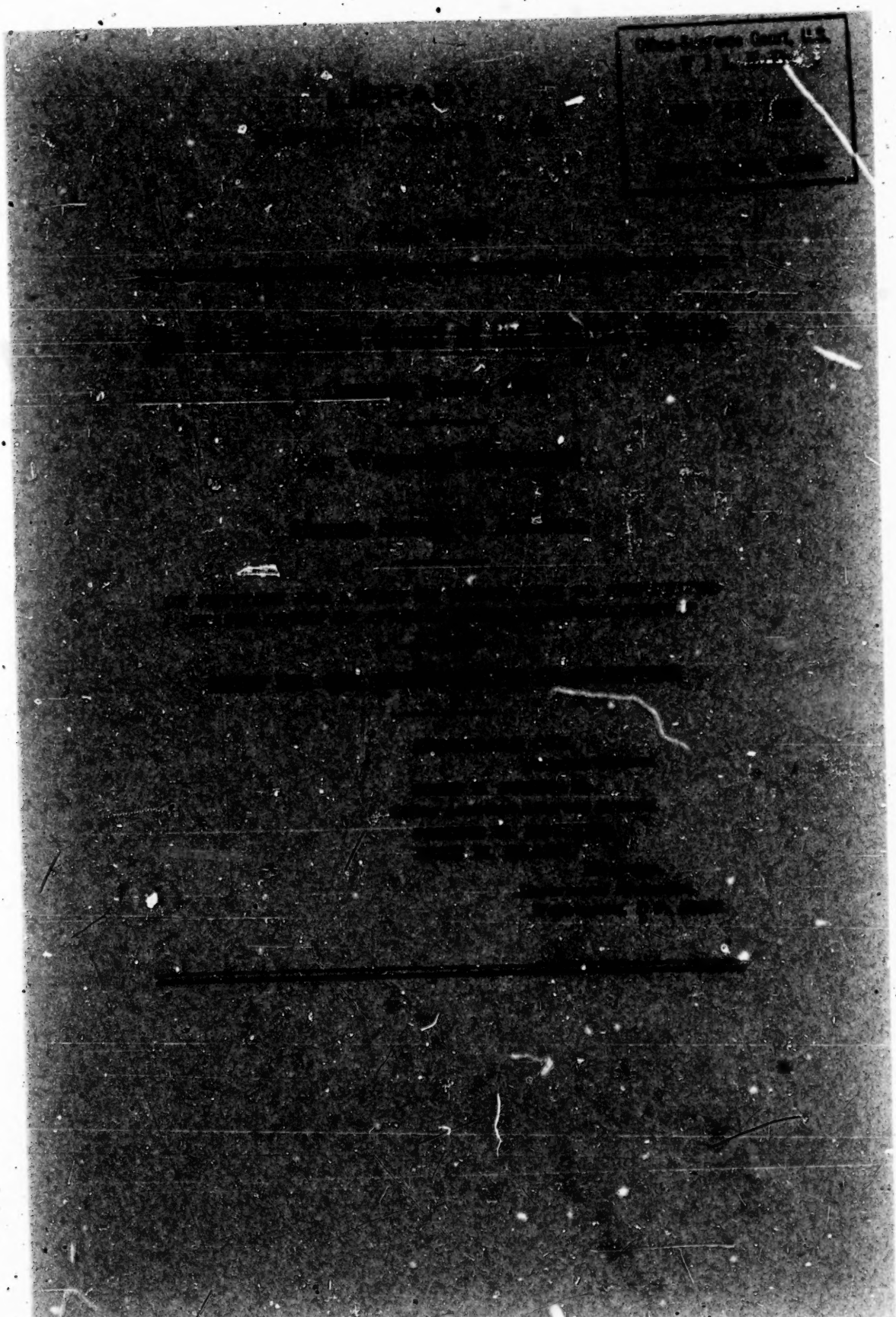

INDEX

Opinion below
Jurisdiction
Questions presented
Statutes and rule involved
Statement
Argument
Conclusion

CITATIONS

Cases:

Fay v. *New York*, 332 U.S. 261
Holland v. *United States*, 348 U.S. 121
United States v. *Flynn*, 216 F. 2d 354, certiorari denied, 348 U.S. 909

Statutes:

Internal Revenue Code of 1939:
Sec. 145 (26 U.S.C., 1952 ed., Sec. 145)
Sec. 147(a) (26 U.S.C., 1952 ed., Sec. 147(a))
28 U.S.C. 753(b) 3, 11

Miscellaneous:

Federal Rules of Criminal Procedure:
Rule 17
Rule 43 3, 10

705 614 61

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 383

IAN WOODNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

Two opinions of the district court on pre-trial motions are reported at 189 F. Supp. 355 and 28 F.R.D. 22. The opinion of the district court denying a motion for new trial (R. 30a–43a)[1] is not yet reported. The opinion of the court of appeals (Pet. 1a–6a) is reported at 317 F. 2d 649.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1963 (Pet. 12a). A petition for rehearing was denied on June 18, 1963 (Pet. 13a–14a). On

[1] "R." references are to petitioner's appendix in the court of appeals. "Supp. R." references are to the government's appendix in the court of appeals.

July 10, 1963, an order was signed by Mr. Justice Harlan extending the time to file a petition for a writ of certiorari to August 17, 1963. The petition was filed in this Court on August 16, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge committed reversible error when, without prior objection from petitioner's counsel, he conferred privately and off the record in open court with prospective jurors who sought to be excused on grounds of hardship from serving in petitioner's extended trial.

2. Whether the government unfairly withheld certain documents from petitioner.

3. Whether the district court's instruction on circumstantial evidence was erroneous.

STATUTES AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not

more than five years, or both, together with the costs of prosecution.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

28 U.S.C.:

SEC. 753. REPORTERS.

* * * * * *

(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court: * * *

Federal Rules of Criminal Procedure:

Rule 43

PRESENCE OF THE DEFENDANT

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not

required at a reduction of sentence under Rule 35.

STATEMENT

1. Petitioner was charged in four counts with willful attempts to evade his individual income taxes for the years 1950, 1951, 1952 and 1953, in violation of Section 145(b) of the Internal Revenue Code of 1939 (R. 3a–5a). After a jury trial of more than four weeks, the jury disagreed as to the counts for 1950 and 1951, but found petitioner guilty on the counts pertaining to 1952 and 1953. Petitioner was sentenced to imprisonment for concurrent terms of 2½ years and was fined a total of $20,000, with a direction that he become eligible for parole after serving six months of the sentence (R. 28a–29a). The district court denied petitioner's motion for acquittal or for a new trial (R. 30a–43a), and the court of appeals affirmed the judgment (Pet. 6a).

2. Petitioner was first tried on these charges in 1961. After a six-week trial, the jury failed to reach a verdict on any of the four counts, and a mistrial was declared (R. 30a, 36a). At a pretrial conference which preceded petitioner's second trial, it was agreed that the trial judge would inform prospective jurors that the trial would be a lengthy one (R. 38a–39a; Supp. R. 18a).

Petitioner's second trial began on April 9, 1962. Twelve persons of a panel of about seventy talesmen first took seats in the jury box and were questioned by the court as to possible prejudices and relationships with the parties, counsel, or with the Chemical Bank and Trust Company, which was involved in the case (Supp. R. 2a–11a). One juror was

excused (Supp. R. 6a). The court then informed the prospective jurors that the trial would take four to five weeks, and stated (Supp. R. 12a):

> Now, I would like those of you who have any serious excuses which might prevent you from attending for that length of time to advise me now and I will confer with you privately about it.

Six or more prospective jurors raised their hands. With no objection from petitioner's counsel, the court proceeded to confer privately at the bench with each such juror, and three of them were excused (Supp. R. 12a). Thereafter, the *voir dire* continued with respect to those who took the seats of the excused talesmen. One was an employee of the Chemical Bank, and she was excused (Supp. R. 12a–13a). The prospective juror who took her seat suggested that the duration of the trial might present a problem to him, and he was invited to approach the bench and to confer privately with the court (Supp. R. 13a). Again there was no objection made by petitioner's counsel.

When the court announced that counsel should begin to exercise their peremptory challenges, petitioner's attorney first noted his objection. He said at a bench conference (Supp. R. 17a):

> I want the record to note that I have just advised the Court that I must object to the manner in which some of these jurors were examined by the Court in the absence of counsel to determine whether or not they could sit and whether they had a proper excuse not to.

Petitioner's counsel followed this statement with an objection to the court's disclosure to the prospective jurors that the trial was expected to last four or five weeks, asserting that businessmen would be reluctant to serve for so long a time (Supp. R. 17a–18a). The ensuing colloquy at the bench concerned the question whether counsel had agreed that the expected duration of the trial should be disclosed to the talesmen; nothing further was said with reference to the private conferences with prospective jurors (Supp. R. 18a–19a). No objection whatever was made at this time to the failure of the court stenographer to transcribe what was being said at the private conversations.

At the conclusion of the bench conference during which these objections were made, two other prospective jurors expressed a desire to speak to the court about the length of the trial. One of these was excused (Supp. R. 22a). The talesman who replaced the excused juror also conferred privately with the court and was excused (Supp. R. 23a).

The same procedure was followed with respect to the prospective jurors who replaced those who were challenged peremptorily or for cause by counsel for both sides. In each instance the private conference was at the bench, in open court, but out of the hearing of counsel and off the record (Supp. R. 19a–36a). No further objection was made by petitioner's counsel. When the process was concluded, the court informed both counsel of the reasons given by the prospective jurors who had been excused (Supp. R. 37a–38a). Petitioner's counsel, objecting again to the fact that the possible duration of the trial had been mentioned to the prospective jurors, moved "that this

entire group be discharged and we pick a jury from a new group of seventy-five people without any mention of length of time" (Supp. R. 39a). The motion was denied, and, after some further proceedings, the jurors were sworn (Supp. R. 47a).

The next morning, petitioner's counsel moved for a mistrial, stating that the "manner in which the prospective jurors were questioned * * * in camera in the absence of counsel and the defendant was improper," and amounted to a violation of Rule 43 of the Federal Rules of Criminal Procedure (Supp. R. 49a–50a). The court explained that he heard the excuses in private because "I know from experience that discussions of personal reasons of excuse before a large group of people who are not anxious to be tied down inspires the submission of similar [successful] excuses by those who hear" (Supp. R. 52a). Petitioner's counsel then urged for the first time that the conversations between the court and the prospective jurors "should be a matter of record" (Supp. R. 56a). The motion for a mistrial was denied (Supp. R. 58a–59a).

3. The sufficiency of the evidence to support the verdict is not challenged by the petitioner. It may be summarized briefly as follows:

From 1950 through 1953, petitioner was president and controlling stockholder of a group of corporations engaged in the real estate and construction business. These included Shipley Corporation, a holding company, which owned Jonathan Woodner Company and about forty-five to fifty other corporations (Supp. R. 184a–186a; Govt. Exs. 5, 8, 38). The counts relating to the years 1952 and 1953 the only ones upon

which petitioner was convicted—were based upon certain interest rebates and a refunded FHA filing fee which were allegedly diverted from the Jonathan Woodner Company to petitioner's personal use.

This income grew out of construction loans from the Chemical Bank and Trust Company to two subsidiaries of Shipley Corporation—Chanute Gardens Corporation and Chanute Apartments Corporation (Supp. R. 74a–76a). Petitioner, on behalf of Jonathan Woodner Company, personally negotiated the loans with the bank in 1950. The bank agreed to lend about $6,500,000 at 4 percent interest to the Chanute corporations, and to rebate ½ percent to Jonathan Woodner Company or its nominee (Supp. R. 61a–66a, 74a–76a). The bank would have been willing to make the loans at 3½ percent interest but it agreed to the rebate arrangement at petitioner's request (Supp. R. 76a). Thereafter, petitioner instructed the bank to pay the rebates to one Edward Jasen (Supp. R. 77a, 277a), who was petitioner's personal friend and had been employed in petitioner's business enterprises since 1947 (Supp. R. 130a). Petitioner also instructed the same bank to pay to Jasen, instead of to the Jonathan Woodner Company, a refund of $9,720, representing filing fees in connection with a rejected FHA mortgage loan application (Supp. R. 68a–73a, 429a–425a). The rebates totalled $7,740.45 in 1951, $30,407 in 1952, and $15,163.45 in 1953 (Supp. R. 442a–443a).

Jasen endorsed the FHA refund check, cashed it into denominations of not more than fifty dollars, and placed the cash in a briefcase which was kept in the Shipley Corporation's offices located in petitioner's home (Supp. R. 131a, 136a, 263a, 285a). In Febru-

ary 1952, Jasen leased a safe deposit box at the National City Bank and transferred the cash to the box. Only Jasen and petitioner had access to this box (Supp. R. 132a–133a). Thereafter, Jasen regularly cashed the rebate checks into denominations of not more than fifty dollars and put the cash in the box (Supp. R. 135a–136a, 426a–431a).

Jasen testified that he "considered all of these funds [in the box] to be Mr. Woodner's funds" (Supp. R. 137a), and that he commingled the rebate money with other cash given to him by petitioner for his personal use. Petitioner testified that he never discussed the ownership of the cash with Jasen, but that he regarded all the funds as belonging to the Jonathan Woodner Company (Supp. R. 286a). At various times, generally on petitioner's instructions, Jasen withdrew cash from the box and deposited it in petitioner's personal bank account, gave it to petitioner, or paid it to employees of the Jonathan Woodner Company (Supp. R. 138a–141a). On occasions when it received these funds, the company was instructed by Jasen to enter the amount on its books as a loan from petitioner (Supp. R. 146a, 168a–173a; 412a–413a, 454a–457a). Petitioner testified in his own behalf, and offered explanations as to the procedures followed with respect to these payments (Supp. R. 270a–324a). It was undisputed that neither the rebate payments nor the refund of the FHA filing fee were reported on petitioner's tax returns.

ARGUMENT

None of petitioner's contentions calls for review by this Court since all were correctly rejected by the

district court and by the court of appeals. There is no conflict of decisions concerning any of the questions presented, nor was any issue decided inconsistently with any opinion or decision of this Court.

1. Petitioner's principal contention is that the district court engaged in impermissible private communications with prospective jurors who asserted that a lengthy trial would impose a hardship upon them. This argument is based primarily on Rule 43 of the Federal Rules of Criminal Procedure, which provides: "The defendant shall be present * * * at every stage of the trial including the impaneling of the jury * * *."

The stage at which prospective jurors' hardship excuses are considered, however, is not a "stage of the trial" or any part of the "impaneling of the jury." As the court of appeals observed (Pet. 5a), it is a function which may be performed by jury clerks, who need not even report their findings to the parties. *United States* v. *Flynn*, 216 F. 2d 354, 386–388 (C.A. 2), certiorari denied, 348 U.S. 909. Consideration of hardship excuses is one of the "administrative procedures in advance of trial" which were established "to eliminate from the panel those who * * * would be rejected by the court after its time had been taken in examination to ascertain the disqualifications." *Fay* v. *New York*, 332 U.S. 261, 271.

Section 753(b) of the Judicial Code, also relied upon by petitioner, is inapplicable for the same reason. It requires court reporters to "record verbatim * * * all proceedings in criminal cases had in open court." But when the district court is engaged merely in the sort of administrative tasks which are ordi-

narily left to jury clerks, there is no more reason to require that colloquy be transcribed than there is to require transcription of the jury clerks' interrogations of prospective jurors. Hence, the conversations between the talesmen and the court were not the "proceedings" contemplated by 28 U.S.C. 753(b).

In any event, petitioner's objections were correctly rejected by the district court because they came too late. No objection was made when the first group of prospective jurors approached the bench. Contrary to petitioner's claim that counsel would have had "to trample on the prospective jurors who were being examined" (Pet. 6, note *), all that petitioner's attorney had to do under the circumstances was to rise and state his objection. Moreover, counsel remained silent even after the first group of jurors had been privately interviewed, and subsequently made no effort to prevent the court from having another private conversation with a *single* prospective juror who had replaced one of those excused by the court. (See p. 5, *supra*.) And the objection, when finally made, adverted only to the "absence of counsel," failed to cite Rule 43, made no reference to the reporter's failure to transcribe the conversations, and was quickly dropped. It was not reasserted at any other point during the day's proceedings. In these circumstances, the court was justified in continuing with the course it had adopted at the outset. The more complete statement of the grounds for petitioner's objection which was offered the following morning, after the jury had been sworn, obviously came too late to permit the court to rectify whatever error may have been committed. And the afterthought that the conversations

should have been made "a matter of record" could hardly be taken as a timely preservation of petitioner's present argument based upon 28 U.S.C. 753(b).

2. Petitioner's contention that the government withheld certain documents relevant to his defense is patently without merit. The documents in question were information returns which the Chemical Bank may have been required to file under Section 147(a) of the Internal Revenue Code of 1939. They were neither mentioned nor requested before the last day of the second trial, when the bank's mortgage loan officer was recalled by petitioner and asked whether the bank had filed such returns with reference to the rebate payments. He replied that these matters were handled by a different department within the bank, and that he had no knowledge whether such returns were filed (R. 602a). Thereafter, petitioner's counsel requested the government to produce the returns. The court ordered government counsel, "If you have them in your file * * * I direct you to produce them." Government counsel replied that he had "[n]ever heard of them" (Supp. R. 362a).

Assuming *arguendo* that the documents were relevant, petitioner's demand obviously came much too late. No effort was made before or during trial to subpoena these documents—as could have been done under Federal Rule of Criminal Procedure 17(c)—and petitioner was not entitled to force proceedings to a halt on the last day of trial merely to gain possession of papers whose existence was doubtful and

whose relevance was obscure.[2] At best, the returns were only remotely relevant. Only if they were filed, and if the Jonathan Woodner Company was named as payee, and if the employees or auditors of the company were likely to have had knowledge of their filing, could the returns have had any bearing whatever on the question of petitioner's intent.

3. Petitioner's final contention is that the district court erred in stating to the jury that "[s]ometimes circumstantial evidence is even more convincing than direct evidence * * *". But this instruction was entirely consistent with *Holland* v. *United States*, 348 U.S. 121, 139–140, where this Court held "confusing and incorrect" an instruction that circumstantial evidence, in order to be considered, must exclude every reasonable hypothesis other than guilt. Here, as in *Holland*, the jury was properly instructed on the standard for reasonable doubt (R. 685a–686a). The additional statement that circumstantial evidence may occasionally be more convincing than direct evidence was accurate and permissible in light of *Holland*, 348 U.S. at 140.

[2] When petitioner's counsel sought to delay the trial in order to give him an opportunity to subpoena the returns, the court denied the request because of counsel's "dereliction in not subpoenaing this a long time ago." (See the Official Typed Record, pp. 6554–6555.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
JOHN B. JONES, JR.,
Acting Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

SEPTEMBER 1963.